Supreme Court, U.S.
FILED

091356 MAY 3- 2010

OFFICE OF THE CLERK

No. 09-

IN THE
SUPREME COURT OF THE UNITED STATES

RAFIL DHAFIR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

PETER GOLDBERGER
Counsel of Record
50 Rittenhouse Pl.
Ardmore, PA 19003
(610) 649-8200
Attorney for Petitioner

May 2010

QUESTIONS PRESENTED

1. Does the First Amendment's Establishment Clause permit the United States, in a mail fraud prosecution, to put to a jury the question of whether a defendant's charitable fundraising activity constituted a criminal "fraud" because it deviated from the government's own interpretation of the precepts of the defendant's religion?

2. Can a case of mail or wire fraud be based on a theory that charitable funds were "misused," when all the donors called as witnesses testified that all the charity's activities were consistent with the purposes for which their funds were donated?

3. Does the Confrontation Clause permit a federal trial court to bar cross-examination of government witnesses for bias, because a motion to dismiss for selective prosecution, raising some of the same topics, has been denied?

4. Is it consistent with this Court's post-Booker decisions for a court of appeals to remand a case for resentencing without first ruling on a preserved objection to the guidelines range, advising the district court instead that it may simply declare on remand that its sentence would not be different regardless of the guidelines calculation?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Rafil Dhafir and the United States). The superseding indictment named five co-defendants: Maher Zagha (who was not in the United States when the indictment was filed, and has not returned), Ayman Jarwan, Osameh Al Wahaidy, Help the Needy (a corporation), and Help the Needy Endowment, Inc. The case was dismissed against the corporations. Jarwan and Al Wahaidy pleaded guilty. Al Wahaidy appealed. The decision of his appeal is reported sub nom. United States v. Dhafir, 461 F.3d 211 (2d Cir. 2006). Priscilla Dhafir, William Hatfield, and Ahmed Ali pleaded guilty to related charges in separate cases. None appealed.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
LIST OF ALL PARTIES ii
INDEX TO APPENDIX iv
TABLE OF AUTHORITIES v

PETITION
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED 2
STATEMENT OF THE CASE
a. Procedural History 5
b. Statement of Facts 8
c. Statement of Lower Court Jurisdiction 15
REASONS FOR GRANTING THE WRIT 15
1. The basis on which the court of appeals affirmed petitioner's mail fraud convictions is inconsistent with this Court's cases construing the First Amendment's guarantee of freedom of religion 16
a. The theory of "intent to defraud" was impermissible under the First Amendment... 16
b. Intent to defraud could not be proven in the other ways attempted by the government 20
i. The record does not establish that any donor funds were misspent 21
ii. The record does not establish any materially false statements by Dr. Dhafir 22

2. The decision of the court below cannot be reconciled with this Court's precedent concerning a defendant's right to confront and cross-examine adverse witnesses for bias .. 24
3. The Court of Appeals decision flouts this Court's recent rulings which hold that a correct Guidelines calculation is essential to assessing the procedural reasonableness of a federal sentence 28
a. The Second Circuit's holding that a district court is not required to determine the accurate Guidelines range before selecting the sentence is contrary to controlling precedent 29
b. The panel's sua sponte invitation for the district court on remand to vary from the guidelines sentence for policy reasons violates this Court's precedent and the governing statute 33
CONCLUSION 39

INDEX TO APPENDIX

A. Court of Appeals Opinion (not precedential), 342 Fed.Appx. 702 (Aug. 18, 2009) ..... Appx. A1
B. Court of Appeals Opinion (precedential), 577 F.3d 411 (Aug. 18, 2009) ..... Appx. B1
C. Memorandum decision of district court (unpublished) (Aug. 31, 2005) ..... Appx. C1
D. Order of the Court of Appeals denying Gov't petition for rehearing (Dec. 2, 2009) ... Appx. D1
E. Order of the Court of Appeals denying Def't petition for rehearing (Nov. 30, 2009) . Appx. E1

TABLE OF AUTHORITIES

CASES

Davis v. Alaska, 415 U.S. 308 (1973) 27
Delaware v. Van Arsdall, 475 U.S. 673 (1986) 27
Gall v. United States,
552 U.S. 38 (2007) 29-33, 36, 37, 38
Kimbrough v. United States,
552 U.S. 85 (2007) 34-38
Koon v. United States, 518 U.S. 81 (1996) 37
Olden v. Kentucky,
488 U.S. 227 (1988) (per curiam) 27
Pointer v. Texas, 380 U.S. 400 (1965) 27
Rita v. United States, 551 U.S. 338 (2007) 32
United States v. Abel, 469 U.S. 45 (1984) 25
United States v. Ballard, 322 U.S. 78 (1944) 16
United States v. Booker, 543 U.S. 220 (2005) .. 30, 31
United States v. Cavera, 530 F.3d 180
(2d Cir. 2008) (en banc) 30, 32
United States v. Crosby,
397 F.3d 103 (2d Cir. 2005) 29, 33
United States v. Hale, 422 U.S. 171 (1975) 17
United States v. Sasson,
62 F.3d 874 (7th Cir. 1995) 26
Williams v. United States, 503 U.S. 193 (1992) 37, 39

CONSTITUTION, STATUTES AND RULES

U.S. Const., amend. I (estab. of religion) 16, 20
U.S. Const., amend. VI (Confrontation Cl.) . 2, 27, 28
U.S. Const., amend. VI (jury trial) 25, 31
U.S. Const., amend. XIV (Due Process Cl.) 28

18 U.S.C. § 371 ..... 5, 7
18 U.S.C. §§ 1001, 1347 6
18 U.S.C. §§ 1341, 1343 ..... 3, 6
18 U.S.C. § 1956 5
18 U.S.C. § 1956 5
18 U.S.C. § 3231 15
18 U.S.C. § 3553(a) 4, 29, 31, 32, 34, 38
18 U.S.C. § 3664(c) 6
18 U.S.C. § 3742 4
18 U.S.C. § 3742(f) 29, 32, 37, 38
26 U.S.C. § 501(c) 5
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291 15
28 U.S.C. § 2101(c) 2
28 U.S.C. § 2106 37
31 C.F.R. § 575.210 9
31 C.F.R., part 575 9
50 U.S.C. § 1705(b) 5
Fed.R.Evid. 403 ..... 17, 19
Rule 13.1, 13.3, 30.1 2
USSG § 2S1.1 ..... 30, 31, 34, 38

MISCELLANEOUS

Executive Order No. 12722 (Aug. 2, 1990) 8
Executive Order No. 12724 (Aug. 9, 1990) 8
U.S. Sent. Comm'n, Money Laundering Working Group Report (1995), available at: http://www.ussc.gov/moneylau/MONILAUN.HTM ... 38
USSG appx. C, amend. 634 (2001) 35

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RAFIL A. DHAFIR respectfully petitions this Court for a writ of certiorari to review the judgment and opinions of the United States Court of Appeals for the Second Circuit filed and entered on August 18, 2009.

OPINIONS BELOW

The Second Circuit's non-precedential Summary Order and memorandum (per B.D. Parker, J., with Calabresi, J.[1]), affirming the petitioner's convictions, and its precedential opinion, vacating and remanding the judgment of sentence, were filed August 18, 2009. They are published at 342 Fed.Appx. 702 and 577 F.3d 411 respectively. Copies are attached as Appendices A and B. The United States District Court for the Northern District of New York (Mordue, J.) wrote a memorandum opinion, filed Aug. 31, 2005, determining the applicable Guidelines range, which is not published. A copy is Appendix C.

---

[1] Then-Judge Sotomayor was on the panel when it heard argument, but was elevated to serve as a Justice of this Court prior to the issuance of the decision.

JURISDICTION

On December 2, 2009, the United States Court of Appeals for the Second Circuit denied the government's timely petition for rehearing of that Court's opinion on direct appeal vacating petitioner's sentence. Appx. D. The order denying Dr. Dhafir's petition for rehearing from the Second Circuit's summary order is dated November 30, 2009. Appx. E. On February 19, 2010, under No. 09A765, Justice Ginsburg extended the time for filing this petition to and including May 1, 2010, a Saturday. This petition is timely filed on or before the first business day thereafter. Rules 13.1, 13.3, 30.1; 28 U.S.C. § 2101(c). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The **First Amendment to the Constitution of the United States** provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion ...." The **Sixth Amendment to the Constitution** provides, in pertinent part, that "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...."

The **Federal Criminal Code** provides, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means

> of false or fraudulent pretenses, representations, or promises, ... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service ... shall be fined under this title or imprisoned ....

18 U.S.C. § 1341. The Criminal Code further provides, in the Sentencing Reform Act:

> **§ 3553. Imposition of sentence**
>
> (a) **Factors to be considered in imposing a sentence.** -- The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –
>
> * * *
>
> (4) the kinds of sentence and the sentencing range established for –
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –
>
> (i) issued by the Sentencing Commission ....; and
>
> (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced ....

* * * *

18 U.S.C. § 3553(a). Moreover:

§ 3742. Review of a Sentence.

* * * *

(f) **Decision and Disposition.** – If the court of appeals determines that –

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

* * * *

(3) the sentence is not described in paragraph (1) or (2) it shall affirm the sentence.

* * * *

18 U.S.C. § 3742.

STATEMENT OF THE CASE

This petition presents questions about the fundamental fairness of petitioner's trial, and an attempt by the court of appeals to avoid dealing with an error that greatly increased petitioner's sentence.

a. Procedural History

Petitioner Rafil Dhafir, a naturalized U.S. citizen, respected oncologist, and leader in the Muslim community of Syracuse, New York, was convicted and sentenced on charges arising out of his operation of a religious charity, Help the Needy ("HTN"), which sent food and medicine to Iraqi civilians between 1994 and 2003 in violation of U.S. law.

Dr. Dhafir was indicted on February 19, 2003, in the Northern District of New York and charged with conspiracy to violate the United States sanctions in place against Iraq which had existed since 1990. 50 U.S.C. § 1705(b). The indictment also alleged a conspiracy to transfer funds out of the United States to promote violations of the sanctions, 18 U.S.C. § 1956(h), and 12 particular transfers for that purpose, id.(a)(2)(A).

A third superseding indictment filed April 21, 2004, included charges of conspiring to defraud the IRS in relation to the calculation of income tax due from donors to HTN by claiming that HTN was an approved IRC § 501(c)(3) charity, 18 U.S.C. § 371; mail and wire fraud against HTN donors involving false claims that contributions would be tax deductible and would be spent in certain ways, id. §§ 1341,

1343; and a separate set of counts charging health care fraud in certain Medicare billings for the administration of chemotherapy, id. §§ 1001, 1347. A fourth superseding indictment, filed in August 2004, contained the same charges, plus "sentencing allegations."

Petitioner proceeded to trial before Judge Mordue and a jury in October 2004. Trial continued for 52 days; this was followed by at least two more days of jury deliberations. The jury ultimately convicted Dr. Dhafir on 59 of 60 counts, and acquitted him of one.

On October 27, 2005, Judge Mordue imposed sentences cumulating to 22 years' imprisonment, with three years' supervised release, no fine, and $5900 in special assessments. On January 24, 2006 -- 89 days later; see 18 U.S.C. § 3664(c)(5) -- the court issued a memorandum and order directing payment of $865,272.76 in restitution to five recipients.

On direct appeal, the applicant challenged the district court's restrictions on cross-examination designed to expose bias against him; the sufficiency of the evidence to prove the mail and wire fraud counts; the court's unfair allowance of evidence and argument suggesting that criminal intent could be inferred from the Dr. Dhafir's alleged failure to adhere to the government's interpretation of Islamic religious doctrine in his charitable operations; improper joinder of the health care fraud charges with the other counts; the multiplicity of counts 1 and 15, which both charged conspiracies under 18

U.S.C. § 371 where there was no more than one agreement; and finally, the district court's calculation of the sentencing guideline range for money laundering, on which his sentence was premised.

The appeal was argued before a panel comprising Judges Parker, Calabresi, and Sotomayor. On August 18, 2009, after Justice Sotomayor's elevation, the court of appeals rendered its tandem opinions. Dr. Dhafir's convictions were affirmed, Appx. A, while the sentence was vacated and remanded. Appx. B. Suggesting agreement with, without deciding, the petitioner's argument that the money laundering guideline had been erroneously calculated, the panel nevertheless held that the district court would be free on remand to pretermit a correct guideline calculation, if the district judge concluded that the same sentence should be imposed in any event.

Both parties petitioned for rehearing – with both petitions emphasizing this Court's precedent holding that a correct guidelines calculation by the district court was necessary to the imposition of a reasonable sentence under the governing law. (The government contended that the district court's calculation was correct, and the sentence should therefore be affirmed. The defense argued that the because the calculation was incorrect, a remand for a full resentencing was necessary.) Both petitions were denied. Appx. D, E.

The district court has informed counsel that Judge Mordue will refrain from scheduling the

required resentencing proceedings pending resolution of this petition.

b. Statement of Facts

Appellant Rafil Dhafir, M.D., a naturalized United States citizen, turned 60 last year. Prior to his incarceration, Dr. Dhafir was an established oncologist and active member of the Muslim community in Central New York. A native of Iraq, he has been married to his American-born wife for over 35 years. He is widely known as an apolitical, conservative Islamic scholar and caring physician.

Help the Needy

This case arises from petitioner Dhafir's efforts to aid the civilian population of Iraq during the reign of Saddam Hussein. To that end, Dr. Dhafir in the 1990s created a charitable organization called Help the Needy ("HTN"). HTN's primary goal was to alleviate the suffering of the Iraqi people, especially hunger – particularly among women and children – after the devastation caused during the first Gulf War and harsh conditions resulting from the post-war U.S. sanctions. JA-324; 360-61.[2]

Soon after Iraqi forces invaded Kuwait, President George H.W. Bush issued Executive Orders to forbid trade and financial transactions with Iraq. JA-426. See Executive Order No. 12722 (signed on August 2, 1990) and Executive Order No. 12724 (signed on August 9, 1990). JA-426. Regulations to

---

[2] References in the form "JA-324" are to the Joint Appendix filed in the Second Circuit on appeal.

implement these Orders are found in Title 31 of the Code of Federal Regulations, Part 575. The regulations prohibit any U.S. person from transferring, directly or indirectly, funds or other financial or economic resources to the Government of Iraq or any person in Iraq. 31 C.F.R. § 575.210.

In January 1991 the United States and coalition forces, as authorized by the United Nations, initiated a six-week bombing campaign inside Iraq. The bombing devastated Iraq's infrastructure and economy. JA-361. Hospitals, schools, water and food treatment facilities, homes, and roads were demolished. JA-360-63. The sanctions prevented innocent Iraqi citizens after the bombing stopped from obtaining food, water, health care, or medication. JA-471-72. Feeling a non-political religious and humanitarian obligation to act, Dr. Dhafir decided he must try to help his fellow Iraqis. JA-324-25.

In order to raise funds, Dr. Dhafir spoke at mosques throughout the country on behalf of HTN. JA-328-31. His presentation to potential donors included pictures of starving children in Iraq – the authenticity of which the government has never disputed – which he used to emphasize the urgency of distributing food, medicine, medical supplies, and clothing to needy families. JA-328-31; 501-03.

Initiation of the Investigation

The investigation of Dr. Dhafir – which ended with a tax and health care fraud prosecution, as well as a charge of conspiracy to violate the Iraq sanctions – was prompted by suspicions of terrorist funding.

This started out as an investigation of structuring of bank transactions. JA-265-66. According to a defense offer of proof at a pretrial hearing, a grand jury witness testified that an FBI agent told the witness that the investigation initially operated on a theory that Dr. Dhafir had defrauded Medicare and used the money to fund terrorism. JA-259.

When questioning witnesses during their investigation, government agents made pointed but inapt references to the events of September 11, 2001. JA-580; 586. One government witness, a CPA, testified that two agents and an Assistant U.S. Attorney came to her house three days in a row "waiving the flag and doing everything you can imagine" to get her to surreptitiously record meetings with her client, Help the Needy, and its principal, Dr. Dhafir. JA-580; 586. The agents went so far as to tell this accountant that "9/11 would not have happened if people were more involved," implying that HTN was suspected of involvement in deadly terrorism. JA-586. In fact, there was no such evidence; the only common thread was a commonality of professed religious beliefs, which the prosecutor described as "salafist," between Dr. Dhafir and a certain small number of terrorist groups.

Consistent with this imagined connection, the government executed arrest and search warrants in an aggressive manner (JA-636-39), and sought and obtained Dr. Dhafir's pretrial detention, despite his being a non-violent, religiously-motivated, middle-aged professional with a stable home and family life, no criminal record, and deep ties to the community.

Islamic Principles Relating to Charity

During the course of the trial, a cooperating government witness testified on direct examination regarding Islamic principles relating to charitable donations. JA-331-36. Under religious law, a Muslim is obligated to help people in need. JA-366-68; 508. This witness was asked to explain to the jury that one of the "five pillars of Islam" is "zakat," a requirement that all Muslims donate 2.5% of any annual increase in their net worth. JA-365-66. Zakat can be used only for eight specific purposes, while "general charity," called "sadakah," can be used for any charitable purpose. JA-331-36. However, if individuals give money for a specific purpose, like buying rice, the money must be used for that purpose, the jury was told. If it cannot be used for that purpose, under Islamic law it must be returned to the donor, the government had its witness explain. JA-334-35.

Money Sent Abroad

At trial the government presented testimony and documents showing that Dr. Dhafir, in violation of U.S. government-imposed sanctions, transferred money to Maher Zagha in Jordan. Zagha would purchase food and medicine to be taken into Iraq and disburse the rest directly as stipends to selected families in Iraq. He used couriers and an exchange office in Amman, Jordan. JA-303-04.

Funds Invested by Dr. Dhafir

The IRS traced some donated funds from accounts in the United States to an account in Jordan, back to accounts in the United States, and

then to businesses that were associated with Dr. Dhafir. JA-432-33. Approximately $2.5 million in donations went through the HTN account at Oneida Savings Bank (JA-429), $1.9 million went from there to Maher Zagha's account at Fleet Bank (JA-430), and from there $1.5 million went to a Jordan Islamic Bank account associated with HTN and Dr. Dhafir. JA-430. The IRS traced $298,979.04 back to Dr. Dhafir's own businesses (or business interests). JA-456-60. Petitioner Dhafir had himself donated at least $1.4 million to HTN, however. JA-377.

The IRS analysis could not show where the returned funds originated, including whether some were from Dr. Dhafir's substantial contributions to HTN, money existing in the same accounts before 1995 (JA-428-31; 462-63; 601-03), business dealings petitioner had in the Middle East (JA-347), or money he sent to the Middle East prior to 1995 (JA-408). Moreover, Dr. Dhafir commingled some of his personal funds in the accounts used by HTN. JA-347, JA-372.

A substantial amount of the HTN donations did in fact reach Iraq. JA-411. Federal agents claimed to have found a report in the trash of HTN's office, which was used at trial in conjunction with a ledger kept by Maher Zagha and bank statements from a Jordan Islamic Bank account to describe disbursements made by HTN in Iraq. JA-292-97. In addition, the HTN Annual Report dated October 12, 2000, which agents also said they found in the trash, showed that money was spent on 30,000 breakfasts

for people fasting in Ramadan, 10,000 cows distributed to more than one million people, the construction of four mosques, and $20,000 a month for orphans and poor families in Iraq. JA-302.[3]

Charitable Tax Deductions

Help the Needy was not a state-registered or IRS-approved tax exempt charitable organization (JA-578). In approximately 1995, Dr. Dhafir approached the Somali Relief Fund, an IRS-recognized charity to ask whether HTN could associate with that Fund so that HTN donors could treat their contributions to HTN as having been made to a tax-exempt organization. JA-551-57. After the Somali Relief Fund agreed, Dr. Dhafir advised donors that contributions to HTN were tax deductible. JA-309.[4] Dr. and Mrs. Dhafir themselves deducted their substantial donations to the charity. JA-375-77.[5]

Between approximately 1995 and approximately 2001, the Somali Relief Fund filed charitable organization tax returns (IRS Form 990s) which combined the income from its own fund raising and from HTN's. JA-558-59. There was no evidence presented

---

[3] HTN also shipped hospital equipment (including 50 dialysis machines), which was couriered to Iraq. The medical equipment did not make it across the border. A-302.

[4] This was the basis for many mail fraud counts, alleging the defrauding of donors.

[5] This was the basis for the personal income tax evasion counts.

that Dr. Dhafir knew that HTN donations, which went through the Somali Relief Network's account, were not tax deductible for HTN's donors or for himself, and the government surveillance videotape from the Washington board of directors meeting appeared to show his good faith belief. See Ex. 1.404.26 A-H.

In approximately December of 2001, Dr. Dhafir requested that an employee of HTN arrange for an application to be filed with the IRS to obtain tax exempt status for a successor charity, Help the Needy Endowment (HTNE). JA-522-27; 1072. Petitioner's tax preparer completed and submitted the application, which contained false entries. JA-597-98.[6]

False Visa Application

Petitioner assisted in obtaining a work visa for a Saudi immigrant who worked for HTN. The application contained false statements about the job title and salary of this employee.

Medical Billing

As an oncologist, petitioner treated his cancer patients with chemotherapy. His wife managed the medical practice billings. From March 1998 to October 2001, Mrs. Dhafir submitted claims to Medicare for services provided by nurse practitioners when Dr. Dhafir was out of the country, representing that he had been on site, thereby receiving 100% reimbursements instead of 85%. JA-648; 670.

---

[6] The submission of this application was the basis for conviction on Count 16.

During this period, Dr. Dhafir was over-reimbursed $316,252.51, according to the government's figures. A670. A Medicare investigator testified that Dr. Dhafir told her he was always physically present when Medicare was billed for chemotherapy services. JA-653-54.

c. Statement of Lower Court Jurisdiction

The United States District Court for the Northern District of New York had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed there. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

The indictment defined HTN's donors as "victims" of a mail and wire fraud scheme. At trial the government sought to show that petitioner Dhafir "misused" donations to HTN. The testimony, however, failed to show that HTN used any donor's contribution other than as intended by the donor, and always for a charitable purpose as defined by Islamic law, as the petitioner understood that body of religious doctrine. The government's attempt to audit the contributions failed to show that the totality of any even possibly questionable transactions involved less than the amount of money which the petitioner, Dr. Dhafir, himself gave to HTN. On this basis, several important questions

arise about the prosecution of alleged mail fraud schemes involving religious charities. In addition, this case presents an important issue concerning the interpretation of this Court's recent sentencing opinions, on which both parties sought rehearing in the court below.

1. The basis on which the court of appeals affirmed petitioner's mail fraud convictions is inconsistent with this Court's cases construing the First Amendment's guarantee of freedom of religion.

It has been settled for more than 60 years that a jury hearing a federal mail fraud case cannot be asked to judge questions of what is true or correct in the belief system of any religion. United States v. Ballard, 322 U.S. 78, 88 (1944). If the government had evidence that any donor to HTN gave money in reliance on a specific promise that was false when made, and if that promise was material to the decision to give, then it might be that fraud could be proven. But a jury could not, consistent with the First Amendment, be asked to judge – as the government at trial suggested they should – whether Dr. Dhafir directed the use of donated funds in accordance with the Islamic religious rules of zakat or in accordance with the advice of various shaikhs.

a. The theory of "intent to defraud" was impermissible under the First Amendment.

The Ballard rule is essentially the same as that which prevents the secular courts from adjudicating internal church property disputes which depend on

the correct application of religious doctrine or practices. See, e.g., Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724-25 (1976). Instead, the Court must not allow any but "neutral principles of law" which are "completely secular in operation" to be applied. Jones v. Wolf, 443 U.S. 595, 603 (1979).

No one would contend that activities undertaken in a religious context are immune from regulation, even by the criminal law. But when a jury is repeatedly invited to consider whether a defendant's conduct is consistent with the principles of the religion he professes, with the suggestion that the jury can make the determination of what those principles – properly understood – may be and require, and on that basis decide whether other adherents of the same religion have been "defrauded," then a constitutional line has been crossed. That is what occurred in this case.[7] The prosecutor then exploited this very evidence, in the closing rebuttal argument, to hammer the defendant's credibility generally. A-705-06. Certiorari should be granted to explore the drawing of that important line.

The testimony was that HTN said its charitable funds would go primarily to alleviate hunger, and they did. Some of the funds, however, went for other purposes, and the government asked the jury to

---

[7] Because this case was tried in federal court, the constitutional issue could be avoided by a proper application of Fed.R.Evid. 403. See United States v. Hale, 422 U.S. 171 (1975).

assess whether those other purposes were "proper"[8] – not under the terms of promises made to the donors whose funds were used, judged by "neutral principles of law" which are "completely secular in operation" – but under Islamic religious law:

> So there's some letter [from a shaikh] that says, oh, if you get, you know, you can spend money ... to buy property, an investment, and have the investment profits, if there are any, go to the charity.

A-706. The prosecutor then proceeded to argue against the wisdom of the shaikh's interpretation ("One of the problems with doing that, of course is when you lose money, what do you do? Well, you've just lost the money that was supposed to go to save the starving children ...." id.). And then in final conclusion, the prosecutor used this very evidence to attack the defendant's credibility and to endorse that of the government witnesses. A-707-09. In this way, at the very end of the rebuttal argument when it would have the greatest impact, the prosecutor utilized the improper testimony about "appropriate" use of donated funds under Islamic law to attack the defense on all counts.

---

[8] A course of conduct could only be judged "proper or appropriate" against some standard, which presumably would be legal, ethical, cultural or religious in nature. The witness answered the question, as he had understood it, in terms of Islamic religious principles of charitable giving. The prosecutor did not then suggest that the witness had misunderstood his question.

The defense objected unsuccessfully to this request for incompetent, irrelevant, and unfairly prejudicial testimony. A-332; cf. Fed.R.Evid. 403. The court below held that the defense did not object "on either of these grounds," Appx. A-4, that is, on First Amendment grounds. A Rule 403 objection is broad enough to cover the point now elaborated; thus, the present argument is about the unfair prejudice that ensued from the overruling of a proper evidentiary objection.[9]

The government's mail and wire fraud theory in this case was premised, in critical part, on a contention that appellant Dhafir failed to adhere to Islamic religious principles as interpreted and critiqued by officials of the U.S. Department of Justice. Perhaps a federal prosecutor would be (in his own opinion) a wiser steward of funds donated for Islamic religious purposes than a shaikh. Or perhaps not. But no jury may be permitted to second guess the wisdom or correctness of religious advice, beliefs or practices. Could a prosecutor question the lawfulness of the United Jewish Appeal by showing that some of the funds raised went to support Israel, while some rabbis oppose Israeli policy for various reasons? Or

---

[9] The fact that the defense asked further questions on cross-examination, in an attempt to turn this evidence (once admitted over objection) to the defendant's advantage, after the government had opened the door, hardly makes the admission of the evidence permissible. Appx. A-4 ("arguments touching on religious themes that Dhafir himself introduced").

the fundraising by Catholic Charities, if its advertising focused on the poor, while some of the proceeds went to oppose the death penalty, on which Roman Catholics are of divided opinion? The error of any such approach is grievous and blatant.

Given the emphasis and use of this evidence in the conclusion of the prosecutor's closing rebuttal argument, the First Amendment error prejudiced the defendant on all counts. Certiorari should be granted to address this serious problem in the prosecution of alleged frauds with a religious basis.

b. Intent to defraud could not be proven in the other ways attempted by the government.

Other evidence on the issue of intent to defraud, as described in Counts 51-60, that is, to deceive the donors to Help the Needy ("HTN") about the charitable purposes to which their deductions would be (and were) applied, did not negate the improper testimony about religious charity. The court below ruled that:

> The government put forth ample evidence, largely through the testimony of government agents, that donations to HTN were misused, such that a reasonable jury could conclude that the elements of the charges had been demonstrated. The government also produced sufficient evidence of Dhafir's misrepresentations to donors through his own statements and through HTN literature.

Appx. A-3. Because this summary reason for rejecting a detailed and well-supported insufficiency argument is totally inconsistent with the record.

i. The record does not establish that any donor funds were misspent.

As the court below implicitly recognized, the government's theory of the mail-and-wire fraud portion of this case was the allegation that Dr. Dhafir misspent money contributed by donors to HTN. But the government's own evidence clearly established that Dr. Dhafir himself contributed more money to HTN than the amount that was allegedly "misspent." This defect alone, unmentioned by the court below, undermines completely Dr. Dhafir's convictions on counts 51-60 and shows that the improper religious testimony and argument were likely prejudicial.

A government exhibit labeled "Summary of Dhafir Contributions," JA-1393a-93b, directly establishes that Dr. Dhafir's personal donations exceeded the amount that the government claims was "misspent." Absent tracing, proof that any donor funds were misused therefore necessarily fails. According to this exhibit, Dr. Dhafir's own "Total Contributions" to HTN were $1,450,134. The legitimate HTN expenses that were incidental to its direct charitable activities, such as cash expenses, expenses from bank records, money exchanger fees, and salaries, total $592,606.[10] The "Non-Charitable

---

[10] The government failed to credit these expenses. But any charity will have overhead; absent proof of misappropriation, such expenses cannot be classified as

Money" listed on the exhibit – that is, the amount "misspent" – totals $1,183,493. Simple arithmetic establishes that Dr. Dhafir's own contributions (in addition to being powerful evidence of his lack of intent to defraud and of his altruistic motives) totaled $266,641 more than the "misspent" "Non-Charitable Money."[11] The "testimony of government agents," Appx. A-3, discusses a ledger that Dhafir maintained to track HTN's money.[12]

But, if the "misused" money was less than the amount of Dr. Dhafir's personal contributions, then the ledger and that testimony are irrelevant. JA 456-57. The agents' testimony thus did not prove any "misuse" of donors' funds, and accordingly, no fraud.

ii. The record does not establish any materially false statements by Dr. Dhafir.

The court below also claims that the fraud charges were proven by evidence of Dr. Dhafir's "misrepresentations to donors through his own state-

_____(cont'd)

improper.

[11] The fourth section of the Exhibit characterizes an additional $219,023 as "Preacher/Agent Salary/Expenses." While expenditures for religious education activities were not "illegitimate" even under the government's view of the evidence, adding this total to the "misspent" "Non-Charitable Money" still does not overcome Dr. Dhafir's personal contributions.

[12] The agent admitted that the government was not able to trace funds that existed before 1995. JA-428-31, 462-63, 601-03. Nor did the government determine the source of the funds that already existed in the account which

ments and through HTN literature." Appx. A-3. But none of the government's donor witnesses testified that there was ever a representation by Dr. Dhafir that donations to HTN would be used exclusively for feeding starving children, nor did any donor testify that his donations had not used as directed. HTN cannot have operated as a "scheme to defraud," as alleged, if donations were actually used in the manner intended by the donors. The government's insider witness testified that if donors specified a use for their money, then the donation would be used for that purpose. A-331.

HTN represented that its funds would be used "primarily" to serve starving children in Iraq. A-212-13 (¶ 80). Overwhelmingly the testimony from donor-witnesses refutes any suggestion that Dr. Dhafir directly or indirectly misrepresented how the donated funds would be used within the broad outline of HTN's stated charitable purposes (to "help the needy" who were suffering in Iraq due to the effect on innocent individuals of the sanctions directed by the United States against the Saddam Hussein regime).[13]

HTN's seized records demonstrated that thousands in Iraq benefited from the food and clothing that HTN distributed, all funded by donations. Tr.

_____(cont'd)

were later used to open the initial account for HTN in 1995.

[13] See A-413-16 (testimony of Dr. Mahir Majid); A-467-73 (Muhammad Massod Naim); A-475-90 (Dr. Khalid Qazi); A-493-99 (Maqsood Ahmen); A-502-05 (Ahmed Elantably).

Trans. 5014-16, 5038-39.[14] The record therefore does not show that any material facts were actively concealed or that the statements actually made about HTN in its literature or by Dr. Dhafir were untrue. Accordingly, the decision below fails to justify the convictions for mail/wire fraud, or the money laundering convictions which depended upon the fraud charges.

The petition for certiorari should be granted.

2. The decision of the court below cannot be reconciled with this Court's precedent concerning a defendant's right to confront and cross-examine adverse witnesses for bias.

The court below treated as a routine and harmless restriction on cross-examination the trial court's ban on petitioner's showing that government agents, who testified at trial, harbored bias against him. The basis for the trial judge's ruling was the erroneous perception that the defense was trying to parade before the jury a failed claim of selective prosecution. The court of appeals affirmed on other grounds. Neither rationale can be reconciled with this Court's precedent.

---

[14] Given the dangerous nature of HTN's charitable mission (not so much because of its disregard of the U.S. embargo but because of its defiance of the brutal Saddam Hussein dictatorship), it is not surprising that the individual beneficiaries' names were kept confidential. See Tr. Trans. 1042.

The defense sought to show the jury that the witnesses' bias against Dr. Dhafir was two-fold in its origins: 1) the early belief, later proven erroneous, that Dr. Dhafir was a supporter of terrorism and HTN his fundraising tool in that cause, and 2) the extensive resources that had been dedicated to an ultimately fruitless terrorism investigation.

The court of appeals ruled that the prohibited cross was of "marginal relevance" and was based only on "Dhafir's unsupported theories." Appx. A-3. Neither assertion is correct. The agents' subjective interpretation of HTN's records and fundraising literature was the only basis to find intent to defraud, when none of the participant or donor witnesses supported that theory. The evidence was thus of central, not margin relevance. And counsel had a solid basis to ask the questions: the agents own testimony about the early phases of the investigation, and the testimony of Dr. Dhafir's accountant about what the agents and prosecutors told her about "9/11" and her duties "as a citizen," in an effort to get her to record conversations with her professional clients. Rulings improperly limiting a defendant's ability to demonstrate such bias on the part of the government's agents violate the Sixth Amendment and require vacating a defendant's convictions unless the restriction was harmless beyond a reasonable doubt. See United States v. Abel, 469 U.S. 45, 50 (1984) (noting that the Confrontation Clause "requires a defendant to have some opportunity to show bias on the part of a prosecution witness"). In contrast with

the decision below, the Seventh Circuit has recognized that "where the defense is completely foreclosed from exposing the witness' bias or motive to testify, the limitation may directly implicate the defendant's constitutionally protected right of cross examination." United States v. Sasson, 62 F.3d 874, 883 (7th Cir. 1995)

Dr. Dhafir at trial did not attempt to examine witnesses or to make an argument designed to establish a selective prosecution defense.[15] The defense never elicited evidence regarding the terrorism focus of the investigation in order to argue before the jury that Dr. Dhafir's prosecution was unconstitutional; rather, it sought to highlight that the original investigatory focus, and the fact that it ultimately proved bootless, rendered the government agents particularly venomous towards Dr. Dhafir, and that this "bias" colored the self-described "subjective" testimony of the government agents (A-620) and the arguments of the government prosecutors.

By restricting Dr. Dhafir's counsel from cross-examining the government witnesses on issues

---

[15] Petitioner had raised that issue unsuccessfully by pretrial motion. It is undisputed that groups founded on non-Muslim religious traditions (including Catholics and Quakers) also violated the 1991-2003 Iraq sanctions openly and for similar humanitarian reasons, yet without government reprisal. Nevertheless, for lack of a sufficient record the selective prosecution issue was not renewed on appeal. See United States v. Armstrong, 517 U.S. 456 (1996).

relating to bias and from arguing its bias theory in closing, the trial court improperly prohibited Dr. Dhafir from exercising his well-established rights under the Sixth Amendment's Confrontation Clause to cross-examine witnesses and to present a defense. See Davis v. Alaska, 415 U.S. 308 (1973); Pointer v. Texas, 380 U.S. 400 (1965). As this Court noted in Davis, the "main and essential" purpose of the Confrontation Clause is to secure the opportunity to cross-examine an opposing witness, and a witness's underlying motivations are one of the "principal subjects" for cross-examination. 415 U.S. at 315-17.[16] The ruling below cannot be reconciled with this Court's decisions on the right of confrontation and cross-examination.

In Olden v. Kentucky, 488 U.S. 227 (1988) (per curiam), the Court summarily and unanimously[17] reversed a conviction where the defense had been barred from an inflammatory but critical line of impeachment for bias. In Olden, as in this case, the prohibited cross sought to bring before the jury the defendant's theory of why the principal prosecution

---

[16] In Delaware v. Van Arsdall this Court unanimously found Confrontation Clause error in a restriction on cross-examination, like that discussed in Davis, where the defense was not permitted to cross-examine a critical witness for bias arising out of his own problems with the police.

[17] Justice Marshall dissented solely on the basis that it was his practice to object to all summary dispositions of cases on the basis of the certiorari papers alone.

witness had a motive to lie. The Court in Olden reaffirmed that a denial of full cross-examination can be, and there was, a violation of the Confrontation Clause.[18]

Under these circumstances, the trial court's pretrial order had the effect of completely foreclosing Dr. Dhafir from demonstrating bias on the part of federal agents due to the government's mistaken belief that Dr. Dhafir was a supporter of terrorism. The jury might have weighed that bias significantly against the credibility of the government's witnesses and thus in his favor on the hotly contested issues of intent to defraud. Certiorari should be granted to correct the unfair result, which cannot be reconciled with this Court's cases.

3. The Court of Appeals decision flouts this Court's recent rulings which hold that a correct Guidelines calculation is essential to assessing the procedural reasonableness of a federal sentence.

The Second Circuit below held that "the district court is not bound in ambiguous circumstances ... to choose one Guidelines range in particular, and is free to take the more flexible – and often, more direct – approach of arriving at a more appropriate sentence

---

[18] In that case, arising out of a state court criminal trial, the Confrontation Clause applied through the operation of the Due Process Clause of the Fourteenth Amendment. Here, as in all federal criminal cases, it applies directly.

outside the Guidelines." Appx. B-8; 577 F.3d at 415. In its petition for rehearing, the Government argued (id. at 4-9) that this holding contradicted 18 U.S.C. § 3742(f) and this Court's decision in Gall v. United States, 552 U.S. 38 (2007). Petitioner, as appellant, agreed. Nevertheless, the court of appeals denied both petitions. Appx. D, E. Certiorari should be granted to correct this error.

a. The Second Circuit's holding that a district court is not required to determine the accurate Guidelines range before selecting the sentence is contrary to controlling precedent.

A sentence is reversible as "unreasonable" if it is based on the district court's consideration, pursuant to 18 U.S.C. § 3553(a)(4), of an erroneous guideline calculation. The district court therefore "should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." Gall, 552 U.S. at 49.[19] The Second Circuit reached its contrary holding in reliance upon United States v. Crosby, 397 F.3d 103 (2d Cir. 2005), the case in which that court explained how it would handle pending sentencing appeals in the wake of United States v. Booker, 543

---

[19] Respectfully, there is no lawful basis for this Court's statement that the district court should "begin" its assessment of the § 3553(a) factors with a Guidelines calculation under subsection (a)(4). In many cases, for example, it would be prudent to begin with a survey of "the kinds of sentences available," as directed by § 3553(a)(3).

U.S. 220 (2005). See Appx. B-7 to -8. The Second Circuit reiterated the Crosby holding as a general principle for appellate review of sentences in its post-Gall en banc opinion in United States v. Cavera, 530 F.3d 180, 189 (2d Cir. 2008). Whatever merit that position might have had for dealing with "pipeline" cases, as applied to post-Booker sentencing appeals, such as this one, the Second Circuit's precedent violates the clear and unambiguous holding in Gall. Certiorari should be granted to correct that deviation from controlling authority.

Of all the offenses for which petitioner was convicted, it appeared that the counts with the greatest impact on the sentencing guidelines determination might be the international money laundering charges. The defense contended at petitioner's sentencing that the court should apply USSG § 2S1.1(a)(1), which provides that the base offense level is the "offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense ...; and (B) the offense level for that offense can be determined." Here, the government conceded in its sentencing memorandum that "there [was] overwhelming evidence that the laundered funds [were], indeed, the proceeds of the tax and fraud charges ...." A-1122; see also PSR ¶64; PSR First Addendum at 2 (which noted that the laundered funds were derived from the commission of the tax and fraud offenses, as well as the lack of any dispute on this issue).

Nevertheless, the district court, at the government's urging, relied on the inapplicable USSG § 2S1.1(a)(2). This increased the bottom of the guideline range by approximately ten years over what it would have been had the court calculated the range correctly, under subsection (a)(1).[20]

In the wake of United States v. Booker, 543 U.S. 220 (2005), which held that the mandatory Guidelines scheme violated the Sixth Amendment and that the remedy was to excise certain portions of the Sentencing Reform Act (thereby rendering the Guidelines advisory under 18 U.S.C. § 3553(a)(4)), this Court has developed a significant body of law concerning the proper method of determining a sentence, as well as the proper standard of review under which a sentence decision should be considered. In Gall, the Court explicitly laid out the method by which a district court should arrive at a sentence, and by which a court of appeals should review that decision. The Court directed district courts to correctly calculate the applicable Guidelines range as "the starting point and the initial benchmark" when determining a sentence. Id. at 49. The court below cited, but then did not follow this direc-

---

[20] The range used at sentencing was 324-405 months; applying the correct provision, USSG § 2S1.1(a)(1), Dr. Dhafir's guideline range would have been 210 to 262 months. The district court varied downward and sentenced petitioner to 264 months (22 years' imprisonment) – more than even the top of the correct range.

tive. Appx. B-5.) When reviewing a sentence, the Court further instructed the courts of appeals to follow a two-pronged approach: first, the court of appeals must ensure that the sentencing decision is procedurally sound; that is, "that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors ...." Id. at 51 (emphasis added).[21] Only if the court of appeals finds the sentence decision to be procedurally sound does the court consider the second prong: whether the sentence is substantively reasonable. Id.

The decision below not only brushed aside this Court's controlling precedent, but it also disregarded the governing statute, as the government principally (and correctly) argued in its petition for rehearing below. Under 18 U.S.C. § 3742(f), Congress gave clear and explicit direction to the Courts of Appeals about how to handle sentencing appeals. The court must affirm the conviction unless it finds that the sentence has been imposed in violation of law. In the latter event, however, it must vacate the judgment and remand. Here, the court below did neither.

---

[21] In Circuits which embrace an appellate presumption of reasonableness for within-Guideline sentences (unlike the court below; see Cavera, 530 F.3d at 190), the legitimacy of that presumption arises, if at all, from the fact that the sentence was based upon "a proper application of the Sentencing Guidelines." Rita v. United States, 551 U.S. 338, 347 (2007).

In this case, the court of appeals deviated from binding precedent to hold that when the correct Guidelines calculation is disputed the district court is not bound "to choose one Guidelines range in particular" or "to pigeonhole the case into" a specific range. Appx. B-8.[22] This holding directly contradicts this Court's unequivocal instruction that correct calculation of the Guidelines range must be the "starting point" when determining a sentence. Gall, 552 U.S. at 49.

b. The panel's sua sponte invitation for the district court on remand to vary from the guidelines sentence for policy reasons violates this Court's precedent and the governing statute.

The opinion of the court of appeals remands to the district court and invites that court to nullify its potential legal error in relying on the incorrect Guidelines provision. Although the two-judge panel

---

[22] In Crosby, the court of appeals described one situation in which it might be prudent for a sentencing court to pretermit a complete Guidelines calculation: Specifically, where a district court confronts a complicated factual determination at sentencing, like the amount of "loss" in a securities fraud case, and the prosecution and defense argue for disparate findings, the sentencing judge may "make a decision to impose a non-Guidelines sentence, regardless of which of the two ranges applies." Crosby, 397 F.3d at 112. The sentencing issue in Dr. Dhafir's case, by contrast, did not involve a complicated factual dispute; indeed, it did not turn on a factual dispute at all. Rather, it involved a pure legal question of which base offense level applied to the defendant's convictions. See

stopped short of explicitly holding that the district judge relied on the wrong money laundering Guideline, as petitioner argued, it is clear from the plain language of the Guidelines and even from the court of appeals' own analysis that subsection (a)(1) of USSG § 2S1.1 should have been relied upon in sentencing Dr. Dhafir, because the funds used in the money laundering transactions were derived from offenses for which he had been convicted.

Thus, when the court below remanded the case and suggested that the district court need not "pigeonhole" the case into a specific Guidelines range, it was necessarily really saying that the district court could "cure" this error by stating that – even recognizing that Dr. Dhafir's case was controlled, insofar as the Guidelines are concerned, by subsection (a)(1) – the court would then have varied upward to implement a policy disagreement with the Commission's judgment as to the applicable Guideline range, i.e., a "Kimbrough variance,"[23] while negating all the § 3553(a) reasons which originally led the court to

_____(cont'd)

Appx. B-6 (noting that the issue "essentially raises questions of law"). The exception set forth in Crosby, even if it has any merit it its original context, could never be invoked to excuse a district court's incorrect analysis of a question of law.

[23] See Kimbrough v. United States, 552 U.S. 85 (2007) (holding that district court may properly reject applicable guideline as benchmark for sentencing based on a disagreement with the Sentencing Commission's policy judgment underlying that range).

impose a sentence it believed to be five years (more than 18%) below the bottom of the applicable range.

The Second Circuit noted that its remand is "only to permit the district court to consider whether a different sentence would result from the application of this more flexible approach." Appx. B-8 to -9. This directive is problematic in a number of respects: even if the Second Circuit's "Crosby exception" has any validity, the remand violates an appellate court's circumscribed deferential role in the sentencing process, and a "Kimbrough variance" is inappropriate here in any event.

The argument advanced by the government and endorsed by the district court, Appx. C, with which the panel appears in its opinion to express sympathy, is that, as a matter of policy, it did not "make sense" for Dr. Dhafir to be sentenced to less time for money laundering because he had committed the underlying offense. The panel described the district court's choice of § 2S1.1(a)(2) as "avoid[ing] the odd result that Dhafir would receive a lower sentence if the laundered money was 'criminally-derived' than if it was 'legally-obtained.'" Appx. B-8; 577 F.3d at 415. But this distinction is exactly the one arrived at by the Commission after a lengthy examination of all the competing policy issues involved in sentencing for the federal offense of money laundering, which covers a wide range of divergent criminal activity. See USSG appx. C, amend. 634 (2001).

A variance based on a policy disagreement with the Guidelines was certainly an option available to

the district court at sentencing. Nevertheless, the judge here did not "vary" because of a disagreement with the applicable Guidelines provision; instead, the judge sentenced petitioner Dhafir under a provision which did not, on its face, apply to him. Appx. C. It was that decision which then came before the court of appeals for appellate review.

Post-Gall, as this Court has made plain, the appellate court's role is to review the district court's sentencing decision under a deferential abuse of discretion standard. Gall, 552 U.S at 41. By remanding the case and suggesting sua sponte a possible "Kimbrough variance," the court below abrogated the district court's role in making this type of sentencing determination and exceeded its own.[24] As

---

[24] In addition, the scope of the remand is unclear. The final sentence of the Second Circuit opinion, which appears to be the mandate, directs a "resentencing" (Appx. B-9; 577 F.3d at 415), but the previous paragraph states that the district court is "only" to "consider whether a different sentence would result" if it recognized its error in interpreting and applying the Guideline. Appx. B-8 to -9. The latter limitation risks depriving Dr. Dhafir of any meaningful opportunity to be heard on why – in light of the Commission's careful work amending the money laundering guidelines in precisely the way the court of appeals appeared to find odd – an upward variance from the appropriate range would be grossly unjustified in this case, while the downward variance petitioner in fact received under 18 U.S.C. § 3553(a) should be preserved even after the Guidelines calculation has been corrected.

this Court explained in Gall, "it is not for the Court of Appeals to decide de novo whether the justification for a variance is sufficient or the sentence reasonable," 552 U.S. at 59; it is an implicit corollary that it is also not for the Court of Appeals to develop its own justification for a variance that was not considered by the district court. An error of law is always an abuse of discretion. Koon v. United States, 518 U.S. 81, 100 (1996). Unless the government could demonstrate on the existing record – which it did not and cannot – that this error of the sentencing court was harmless, reversal is required. 18 U.S.C. § 3742(f)(1); Williams v. United States, 503 U.S. 193 (1992).[25]

Even if the court below had not exceeded its circumscribed role in the sentencing process, its implicit suggestion that the district court can now simply reject the applicable Guideline is incorrect. Under Kimbrough, a district court may sometimes vary from the Guidelines range based solely on a policy disagreement, 552 U.S. at 102-08; however, Kimbrough distinguishes between Guidelines which "do not exemplify the Commission's exercise of its characteristic institutional role," 552 U.S. at 109, and those which were formulated based on special expertise, study and national experience. (The variance at issue in Kimbrough, 552 U.S. 85, was not subject to any particularly close scrutiny, in light of

---

[25] As the specific provision on point, the essential commands of § 3742(f) supersede the more general authority granted to appellate courts by 28 U.S.C. § 2106.

the unusual history of the "100:1 ratio" in crack cocaine cases.)

The guideline at issue here stands at the polar opposite from the crack guideline in this respect. Here, the Sentencing Commission conducted a lengthy and comprehensive analysis of the amendment to § 2S1.1 over a period of approximately ten years, and much of its attention was focused on promotional money laundering, the specific type at issue here. See U.S. Sentencing Comm'n Money Laundering Working Group Report (1995), available at: http://www.ussc.gov/moneylau/MONILAUN.HTM. Section 2S1.1 therefore exemplifies the Commission's exercise of its characteristic institutional role at its very best, and a "Kimbrough variance" rejecting that judgment without acknowledging and seriously analyzing its rationale would surely be subject to "closer review" on appeal. See Kimbrough, 552 U.S. at 109. The notion that such a variance could be proposed sua sponte by the court of appeals, or even invoked by the district court, on the type of almost casual remand which occurred here turns the Sentencing Reform Act's balance of powers on its head.

The court of appeals did not explain how its conclusion was consistent either with the governing statutes, 18 U.S.C. §§ 3553(a)(4) and 3742(f), or with this Court's precedents expressly holding the opposite. Gall, 552 U.S. at 49 (court must calculate Guidelines range as "starting point" and "initial benchmark"); Kimbrough, 552 U.S. at 109 (court

must give some deference to range expressing Sentencing Commission's "characteristic institutional role"); Williams, 503 U.S. at 203 (guidelines error not shown by government on appeal to be harmless requires reversal). For all these reasons, the petition for a writ of certiorari should be granted.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit affirming RAFIL DHAFIR's convictions and remanding his sentence.

Respectfully submitted,

PETER GOLDBERGER
Counsel of Record
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200
Attorney for Petitioner

May 3, 2010

342 Fed.Appx. 702
This part of the Court of Appeals decision was not selected for publication in the Federal Reporter.

United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
Rafil DHAFIR, Defendant-Appellant.
Nos. 05-5965-CR, 06-0949-CR.

Aug. 18, 2009.

Peter Goldberger (Pamela A. Wilk, on the brief), Ardmore, PA; L. Barrett Boss, Nicole Angarella, Cozen O'Connor, P.C., Washington, DC, for Defendant-Appellant.

Michael C. Olmsted, Assistant United States Attorney (Brenda K. Sannes, Stephen C. Green, Assistant United States Attorneys, on the brief), for Andrew T. Baxter, Acting United States Attorney for the Northern District of New York, Syracuse, NY, for Appellee.

PRESENT: GUIDO CALABRESI and BARRINGTON D. PARKER, Circuit Judges.[FN*]

FN* The Honorable Sonia Sotomayor, originally a member of this panel, was elevated to the Supreme Court on August 8, 2009. The two remaining members of the panel, who are in agreement, have determined this matter. *See* 28 U.S.C. § 46(d); Local Rule 0.14(2); *United States v. Desimone*, 140 F.3d 457 (2d Cir.1998).

SUMMARY ORDER

***1 UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of conviction is AFFIRMED. The order of restitution is also AFFIRMED.**

We assume familiarity with the underlying facts and procedural history of this case. On February 10, 2005, a jury convicted Defendant-Appellant Rafil Dhafir of numerous charges relating to his operation of a fraudulent charity, Help the Needy ("HTN"), and improper Medicare billings. The United States District Court for the Northern District of New York (Mordue, *J.*) principally sentenced Dhafir to 264 months' imprisonment and ordered restitution in the amount of $865,272.76. Dhafir makes a number of contentions on appeal, most of which lack merit. We address his challenge to the district court's application of the Sentencing Guidelines in a separate opinion.

Dhafir first claims that the district court violated his Confrontation Clause rights by limiting his counsel's cross-examination of witnesses about the government's supposed bias in prosecuting him. Dhafir sought to argue at trial that the government was frustrated by its failure to connect him to terrorist activities and its expenditure of resources on his case. We review the district court's limitations on cross-examination for abuse of discretion. *See United States v. Crowley,* 318 F.3d 401, 417 (2d Cir.2003). We have also held that "the right to confront and cross examine witnesses is tempered by a trial judge's 'wide latitude' to impose 'reasonable limits' in order to avoid matters that are confusing or of

marginal relevance." *United States v. Stewart*, 433 F.3d 273, 311 (2d Cir.2006) (quoting *Howard v. Walker*, 406 F .3d 114 128-29 (2d Cir.2005)). We find that the court did not abuse its discretion in limiting Dhafir's cross[-]examination. Dhafir's unsupported theories about the government's bias were of only marginal relevance to the charges against him, and the district court's restrictions on those questions were well within its latitude in conducting a trial.

We also conclude that the government presented sufficient evidence to convict Dhafir on the mail and wire fraud charges. We review claims regarding the sufficiency of the evidence *de novo*, but will not vacate a conviction on that basis "if, drawing all inferences in favor of the prosecution and viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Santos*, 449 F.3d 93, 102 (2d Cir.2006) (internal quotation marks omitted). Mail and wire fraud both require a scheme to defraud with money or property as its object and use of the mails or wires to further the scheme. *United States v. Shellef*, 507 F.3d 82, 107 (2d Cir.2007); *United States v. Ramirez*, 420 F.3d 134, 144 (2d Cir.2005). The government put forth ample evidence, largely through the testimony of government agents, that donations to HTN were misused, such that a reasonable jury could conclude that the elements of the charges had been demonstrated. The government also produced sufficient evidence of Dhafir's misrepresentations to donors through his own statements and through HTN literature.

*2 Dhafir next contends that the government's ques-

tioning of a particular witness, Waleed Smari, as well as its religious references during closing arguments, rendered his trial unfair. The defense did not object at trial on either of these grounds, so we review this claim only for plain error. *See, e.g., Jones v. United States,* 527 U.S. 373, 388 (1999); Fed.R.Crim.P. 52(b). Dhafir provides no persuasive authority to support his argument that the government's questioning of Smari violated Federal Rules of Evidence 701 and 403, or that its closing remarks violated his First Amendment right to freedom of religion. Further, the record shows that at trial, Dhafir's counsel himself attempted to develop a theory that Dhafir sought religious advice as to the proper uses of donor contributions to HTN and explored this topic during his examination of Smari. We see no error, much less plain error, in the fact that the court allowed the government to ask questions or make arguments touching on religious themes that Dhafir himself introduced.

Dhafir's arguments regarding joinder of claims also lack merit. He contends that the district court erroneously joined the Medicare fraud counts with the HTN-related counts. We again apply plain error review, as Dhafir raised no objection to the joinder below. Under this standard and given the strength of the government's case on the HTN-related charges, we determine that, even if the joinder were improper, Dhafir has not shown "prejudice so severe that his conviction constituted a miscarriage of justice." *United States v. Joyner,* 201 F.3d 61, 75 (2d Cir.2000) (internal quotation marks omitted). We have already found that the government set forth ample evidence on the mail and wire fraud charges; the government's proof on the other HTN-related

counts was overwhelming as well. Therefore, Dhafir is not entitled to relief on this ground.

Neither are we persuaded that Dhafir's convictions on Counts One (conspiracy to violate the International Emergency Economic Powers Act) and Fifteen (conspiracy to defraud the United States by impeding the IRS) were multiplicitous because both counts alleged conspiracies in violation of 18 U.S.C. § 371. Dhafir concedes that this issue too may be reviewed only for plain error. We find that this claim has no merit. Counts One and Fifteen clearly charged two separate conspiracies with different underlying objects and non-overlapping elements and overt acts. The two conspiracies also involved different participants. We have held that where "separate counts of a single indictment allege that the defendant participated in more than one conspiracy in violation of the same statutory provision ... and that the defendant, in each alleged conspiracy, had different groups of coconspirators, the question of whether one, or more than one, conspiracy has been proven is a question of fact for a properly instructed jury." *United States v. Jones*, 482 F.3d 60, 72 (2d Cir.2006). In this case, the jury found that both conspiracies had been proven beyond a reasonable doubt. Dhafir made no argument then or on appeal that the jury was improperly instructed. The district court did not commit plain error in allowing trial to proceed on the indictment as it stood. Further, the district court was permitted to impose overlapping, partially consecutive sentences. *See United States v. Reifler*, 446 F.3d 65, 113 (2d Cir.2006); *United States v. McLeod*, 251 F.3d 78, 83-84 (2d Cir.2001).

*3 Finally, we do not agree with Dhafir that the district court illegally directed him to pay restitution to the New York State Medicaid Restitution Fund and the State of New York Law Department, Restitution Account. Dhafir argues that the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A, only authorizes restitution to direct victims of an offense, and that the payments to the Medicaid Fund and New York Law Department do not conform with that requirement. Again, Dhafir appears to concede that he did not object to the restitution below, and we agree we should review this claim for plain error rather than deem it waived.

The MVRA defines a "victim" as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity. any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern ." 18 U.S.C. § 3663A(a)(2). After Dhafir's trial concluded, the government presented evidence that his fraudulent health care billing scheme caused losses to Medicaid as well as Medicare. Medicaid was therefore a victim of the same criminal scheme and course of conduct that constituted the offense of which Dhafir was convicted. Further, "[a] sentencing court is authorized to provide restitution to 'any' victim of the *offense*, even those not named in the criminal indictment." *United States v. Grundhoefer*, 916 F.2d 788, 793-94 (2d Cir.1990). It was not plain error for the district court to consider Medicaid a victim of the same offense conduct that caused losses to Medicare, and to therefore order restitution to Medicaid.

We also decline to overturn the district court's order of restitution to the New York Law Department Restitution Account, as successor in interest to HTN. No other portion of the restitution order compels compensation by Dhafir to the donor-victims. Therefore, this portion of the order, even if improper, does not rise to the level of plain error because it does not prejudicially affect any of Dhafir's substantial rights.

For the foregoing reasons, the judgment of conviction and order of restitution are AFFIRMED.

C.A.2 (N.Y.), 2009.
U.S. v. Dhafir
Slip Copy, 2009 WL 2501927 (C.A.2 (N.Y.))

577 F.3d 411
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
Rafil DHAFIR, Defendant-Appellant.

Nos. 05-5965-cr, 06-0949-cr.

Argued: Aug. 28, 2008.
Decided: Aug. 18, 2009.

Background: Defendant was convicted in the United States District Court for the Northern District of New York, Mordue, J., various counts relating to the fraudulent operation of a charity and improper billings to Medicare, and was sentenced to 264 months' imprisonment, and he appealed.

Holding: The Court of Appeals, B.D. Parker, Jr., Circuit Judge, held that the district court was not required to choose between the two possible sentencing guidelines base offense levels for money laundering.

Vacated and remanded.

*412 Peter Goldberger (Pamela A. Wilk, on the brief), Ardmore, PA; L. Barrett Boss, Nicole Angarella, Cozen O'Connor, P.C., Washington, DC, for Defendant-Appellant.

Michael C. Olmsted, Assistant United States Attorney (Brenda K. Sannes, Stephen C. Green, Assistant United States Attorneys, on the brief), for Andrew T. Baxter, Acting United States Attorney for the Northern District of New York, Syracuse, NY, for Appellee.

Before: CALABRESI and B.D. PARKER, Circuit

Judges.[FN*]

B.D. PARKER, Jr., Circuit Judge:

Rafil Dhafir appeals from a judgment of conviction in the United States District Court for the Northern District of New York (Mordue, *J.*). Dhafir was convicted on numerous counts arising from his operation of a fraudulent charity and improper Medicare billings. The district court sentenced him principally to 264 months imprisonment and ordered restitution to various victims of the fraud. In this opinion we consider Dhafir's contention that the district court incorrectly calculated his Sentencing Guidelines range. Because we conclude that the district court overlooked an alternate means of determining which sentencing provision under U.S.S.G. § 2S1.1(a) applied to Dhafir's charges, we VACATE and REMAND the incarceration portion of Dhafir's sentence.

BACKGROUND

The charges against Dhafir largely arise from his operation of a fraudulent charity that illegally sent money to Iraq. After a long government investigation, Dhafir was charged in February of 2003 with conspiring under 18 U.S.C. § 371 to violate the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-06, specifically, by conspiring to

---

FN* The Honorable Sonia Sotomayor, originally a member of this panel, was elevated to the Supreme Court on August 8, 2009. The two remaining members of the panel, who are in agreement, have determined this matter. *See* 28 U.S.C. § 46(d); Local Rule 0.14(2); *United States v. Desimone*, 140 F.3d 457 (2d Cir.1998).

violate the Iraqi Sanctions Regulations, 31 C.F.R. § 575, which were issued pursuant to the *413 IEEPA. Dhafir was also charged with promotional money laundering, in violation of 18 U.S.C. § 1956(a)(2)(A), which provides that "[w]hoever transports, transmits, or transfers ... a monetary instrument or funds from a place in the United States to or through a place outside the United States ... with the intent to promote the carrying on of specified unlawful activity" is guilty of a federal offense. Dhafir was also charged, *inter alia*, with tax evasion, a tax-related conspiracy charge, a visa fraud charge, and 24 counts of health care fraud.

After a sixteen-week trial, a jury convicted Dhafir on all counts except for one of the money laundering charges. U.S.S.G. § 2S1.1(a) provides that the base offense level for money laundering is:

> (1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense ...; and (B) the offense level for that offense can be determined; or
>
> (2) 8 plus the number of offense levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the laundered funds, otherwise.

At sentencing, the parties and probation service disagreed on which section of the Guidelines applied to the money laundering counts. Dhafir argued for application of § 2S1.1(a)(1), which would have resulted in a lower Guidelines range, while the government argued for § 2S1.1(a)(2).

The district court agreed with the government that

the money laundering charges should be calculated and grouped according to § 2S1.1(a)(2). "Here," the district court wrote, "the unlawful activity charged in the money laundering counts is the transfer of funds in a manner intended to promote IEEPA violations. The counts are not based on the source of the funds but rather on the offense which their transfer was intended to promote." The court found that § 2S1.1(a)(1) "which establishes the base offense level with reference to the underlying offense *from which the laundered funds were derived,* is inapplicable ... Accordingly, the Court declines to read subsection (a)(1) as requiring it to refer to the source of funds to determine the base offense level in a case such as this, where the defendant is convicted of transferring the funds to promote an illegal activity other than that from which the laundered funds were derived." The court further observed that "applying subsection (a)(1) in the case at bar would in effect reward defendant for using criminally-derived monies because it results in a lower base offense level than if defendant had used legally-obtained monies (which would undisputedly result in the application of subsection (a)(2))." Ultimately, the court denied a downward departure but imposed a below-Guidelines sentence of twenty-two years.

On appeal, Dhafir challenges his conviction, sentence, and restitution on several grounds. In this opinion we focus only on his claim that the district court erred in applying § 2S1.1(a)(2) rather than § 2S1.1(a)(1). [FN1]

FN1. We resolve the remaining issues raised in this appeal in a summary order filed contemporaneously with this opinion.

DISCUSSION

We are guided in our analysis, as we usually are in sentencing cases, by *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), and its progeny. In *Booker,* the Supreme Court held that the Sentencing Guidelines are "effectively advisory," and that a district judge has discretion to choose to impose either a *414 Guidelines or a non-Guidelines sentence. *Id.* at 245, 125 S.Ct. 738. Subsequently, in *Gall v. United States,* 552 U.S. 38, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007), the Court clarified that "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Id.* at 596 (citations omitted). The Court further explained that "[t]he Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party." *Id.* The Court has since added that "as a general matter, courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines." *Kimbrough v. United States,* 552 U.S. 85, 128 S.Ct. 558, 570, 169 L.Ed.2d 481 (2007) (internal quotation marks omitted).

When reviewing, as here, the district court's application of the Sentencing Guidelines to facts, a sentencing determination concerning primarily an

issue of fact warrants "clearly erroneous" review, whereas a determination concerning primarily an issue of law receives *de novo* review. *See United States v. Vasquez,* 389 F.3d 65, 75 (2d Cir.2004). The district court's grouping analysis, which considered the elements of promotional money laundering and the import of those elements for the grouping calculation, essentially raises questions of law. Therefore, we review the district court's decision *de novo. Id.* at 77.

Dhafir argues that the sentence for the money laundering charges should have been calculated under § 2S1.1(a)(1) and therefore grouped with the fraud and tax offenses, because he used the proceeds of those crimes to conduct the money laundering. The district court, he contends, ignored the "plain language" of 2S1.1(a)(1), which requires that when the defendant, as here, committed the underlying offense, the base offense level is calculated according to that underlying offense. Dhafir argues that "[t]he Guideline does not ask whether the defendant has been convicted of a money laundering offense with a 'proceeds' element. It simply asks whether the laundered funds were the proceeds of an offense the defendant committed. Here, based on the jury's verdicts and the government's own theory of the case, the answer to that basic question was 'yes.'" Even though the district court gave Dhafir a below-guidelines sentence, Dhafir maintains that "the court started from an artificially high baseline."[FN2]

FN2. Using Dhafir's method, his base offense level would have been 37: his offense level was ultimately calculated to be 41.

The government counters that the court properly applied § 2S1.1(a)(2) because there was no underlying offense from which the laundered money was derived. This analysis, they contend, is appropriate because "Dhafir's argument that the court should have used the money laundering guideline that calibrates the offense level to the 'underlying offense' would have made no sense on these facts, and would have reduced Dhafir's offense level by virtue of the fact that he was convicted of additional crimes." Gov't Br. at 37.

We note that in this case, the government argued at trial that the source of funds for the money laundering offenses was the underlying fraud and tax offenses, but at sentencing, the government contended *415 that the funds came from other sources. We have not yet addressed the application of U.S.S.G. § 2S1.1 in a case like this one, where it is unclear whether a defendant used the proceeds of his fraud crimes to engage in promotional money laundering. Given these ambiguities and the contradictory positions the government took at trial and at sentencing, we believe the judge overlooked another permissible approach under our post-*Booker* jurisprudence. In *United States v. Crosby*, 397 F.3d 103, 112 (2d Cir.2005), we stated that "precise calculation of the applicable Guidelines range may not be necessary [in making a sentencing determination] .... [S]ituations may arise where either of two Guidelines ranges, whether or not adjacent, is applicable, but the sentencing judge, having complied with section 3553(a), makes a decision to impose a non-Guidelines sentence, regardless of which of the two ranges applies." "This leeway," we wrote, "should be useful to sentencing judges in some cases to avoid

the need to resolve all of the factual issues necessary to make precise determinations of some complicated matters, for example, determination of monetary loss." *Id; see also United States v. Cavera*, 550 F.3d 180, 190 (2d Cir.2008) (en banc) (stating that omission of the Guidelines calculation may sometimes be justified, citing *Crosby); see also Cavera*, 550 F.3d at 2[illegible] n. 4 (Raggi, *J.*, concurring) (explicitly reaffirming *Crosby*'s approach in this regard).

The factual ambiguities in this case present just these circumstances. The district court was correct that choosing § 2S1.1(a)(2) rather than § 2S1.1(a)(1) would avoid the odd result that Dhafir would receive a lower sentence if the laundered money was "criminally-derived" than if it was "legally-obtained." But post-*Booker*, there was no need for the district judge to pigeonhole the case into § 2S1.1(a)(2) to avoid an illogical result and run the risk of setting a bad precedent; indeed, there was no need for him to choose between the two at all. We reiterate here that the district court is not bound in ambiguous circumstances such as these to choose one Guidelines range in particular, and is free to take the more flexible – and often, more direct – approach of arriving at a more appropriate sentence outside the Guidelines. In light of *Booker*, the judge could simply look at all of the facts, take both suggestions into account, consider the § 3553(a) factors, and come up with a "hybrid" approach if he so chose.

We do not hold that the district court erred in determining that the appropriate Guidelines provision was § 2S1.1(a)(2) or that the sentence was unreasonable; we remand only to permit the district court to consider whether a different sentence would

result from the application of this more flexible approach.

Therefore, for the foregoing reasons, we VACATE and REMAND for resentencing consistent with this opinion.

C.A.2 (N.Y.), 2009.
U.S. v. Dhafir
577 F.3d 411

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

-v- 5:03-CR-64 (NAM)

RAFIL DHAFIR,
Defendant.

APPEARANCES
Hon. Glenn T. Suddaby
United States Attorney,
Northern District of New York
Stephen C. Green, Esq.
Michael C. Olmsted, Esq.
Gregory West, Esq.
Assistant United States Attorneys
100 South Clinton Street
Syracuse, New York 13261

Aiello & Cannick
Deveraux L. Cannick, Esq., of counsel
Joel Cohen, Esq., of Counsel
Philip Gaynor, Esq., of Counsel
69-06 Grand Avenue
Maspeth, New York 11378
Attorneys for Defendant Rafil Dhafir

Hon. Norman A. Mordue, D.J.:

MEMORANDUM-DECISION AND ORDER

Sentencing in this matter is now scheduled for October 19, 2005. In its letter of August 26, 2005, the Government confirms that it is not seeking a sentencing enhancement based upon support of terrorism. The Court does not intend to consider for any purpose any allegations concerning support of terrorism. Accordingly, the Court will not address any requests for discovery pertaining to this issue, nor will it accept the testimony of any witnesses on this issue. As the record now stands, there is no relevant factual issue which would warrant the introduction of sworn testimony from any witness.

The Court now turns to the question of the calculation of defendant's sentence under the United States Sentencing Guidelines ("U.S.S.G.").[1] A substantial dispute has arisen in the Probation Office's Presentence Report ("PSR") and the parties' submissions regarding the calculation of the offense level for the money laundering counts. These counts charged that defendant laundered money in violation of 18 U.S.C. § 1956(a)(2)(A), which provides that "[w]hoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States ... with the intent to promote the carrying on of specified unlawful activity" is guilty of an offense against the

---

[1] The Court has a continuing duty to consider the United States Sentencing Guidelines along with the other factors listed in 18 U.S.C. § 3553(a). *See generally United States v. Booker*, --- U.S. ----, 125 S.Ct. 738, 756-57 (2005).

United States. Under 1956(a)(2)(A), then, it is irrelevant whether the funds were derived from a legal or an illegal source provided that the Government proves that the defendant dealt with the funds in a manner intended to promote specified unlawful activity.[2]

The Fourth Superseding Indictment herein charged (Counts 3-14) that defendant:

> transmitted and transferred and caused to be transmitted and transferred funds from a place in the United States to a place outside the United States, with the intent to promote the carrying on of specified unlawful activity – that is, the knowing and willful violation and attempted violation of regulations issued under the International Emergency Economic Powers Act ["IEEPA"], including the "Iraqi Sanctions Regulations," 31 CFR § 575.201 et seq., by, among other things, transferring, directly and indirectly, funds and other financial and economic resources to one or more persons in the Country of Iraq, contrary to Title 50, United States Code, Section 1705 – by the following trans-

---

[2] For example, in *United States v. $739,047.03 in U.S. Currency*, the Ninth Circuit observed: "Promotion of carrying on of bank fraud by attempting to transfer money to a location outside the United States, 18 U.S.C. § 1956(a)(2), does not require the funds in question to be proceeds of prior unlawful activity. If the United States cannot show that the funds are proceeds from 'some form of unlawful activity' [18 U.S.C. § 1956(a)(2)(B)], it may instead show that the person, in dealing with the funds, intended 'to promote the carrying on of a specified unlawful activity ....' 18 U.S.C. § 1956(a)(2)(A)." 103 Fed.Appx. 245, 247 (9th Cir. 2004).

> fers of funds from accounts of Help the Needy at the banks in the United States listed below to an account of Maher Zagha at the Jordan Islamic Bank, each such transfer constituting a separate count[.]

The indictment then listed various specific transactions, one for each count The indictment also charged a money laundering conspiracy based on the same conduct (Count 2) and a conspiracy to evade the Iraqi sanctions (Count 1). The jury acquitted defendant on Count 3 and convicted him on Counts 1, 2, and 4 through 14.

The present dispute concerns U.S.S.G. § 2SI.I(a),[3] which provides that the base offense level for the laundering of monetary instruments is:

> (l) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense...; and (B) the offense level for that offense can be determined; or
>
> (2) 8 plus the number of offense levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the laundered funds, otherwise.

Defendant contends that the proper base offense level should be calculated under section 2S1.1(a)(l) based on the level of the offense from which the laundered funds were derived, that is, the mail and

---

[3] Neither party objects to the recommendation in the PSR that, to avoid *ex post facto* concerns, the Court apply the 2002 Sentencing Guidelines.

wire fraud or the tax offenses, either of which, according to defendant, result in a base offense level of 20.

The government contends that the proper base offense level should be calculated under section 2S1.1(a)(2), that is, 8 plus the offense levels from the table in section 2B1.I corresponding to the value of the laundered funds. The government further contends that the value of the laundered funds is the value of the funds which defendant transferred to a place outside the United States with the intent to promote IEEPA violations, and that the total value of these funds, found by the jury to exceed $3 million, results in 18 additional offense levels. *See* U.S.S.G. § 2B1.1 (B)(1)(J)).

Here, the unlawful activity charged in the money laundering counts is the transfer of funds in a manner intended to promote IEEPA violations. The counts are not based on the source of the funds but rather on the offense which their transfer was intended to promote. For purposes of the money laundering counts the source of the funds is immaterial. Therefore, U.S.S.G. § 2S1.1(a)(1), which establishes the base offense level with reference to the underlying offense from which the laundered funds were derived, is inapplicable.[4]

Accordingly, the Court declines to read subsection (a)(l) as requiring it to refer to the source of funds to determine the base offense level in a case such as

---

[4] For the same reason, the Court does not read 2S1.1 Application Note 6 as supporting the defendant's position on this point.

this, where the defendant is convicted of transferring the funds to promote an illegal activity other than that from which the laundered funds were derived.[5] Indeed, as the Government points out, applying subsection (a)(1) in the case at bar would in effect reward defendant for using criminally-derived monies because it results in a lower base offense level than if defendant had used legally-obtained monies (which would undisputedly result in the application of subsection (a)(2)). The Court holds that the base offense level for the money-laundering counts is properly calculated under 2S1.1(a)(2).

An addendum to the PSR in light of this holding would be helpful. It is therefore ORDERED that the base offense level for the money laundering counts shall be calculated under 2Sl.l(a)(2); and it is further

ORDERED that the Office of Probation submit to the Court and counsel an addendum to the Presentence Report reflecting the holding herein on or before September 16, 2005; and it is further

---

[5] The Court does not read the statement in 2S1.I Application Note 3(A) that subsection (a)(2) applies "where the defendant did not commit the underlying offense" as supporting a contrary result. Rather, that statement refers to third-party money launderers, *i.e.*, those who launder funds generated from underlying offenses that they did not commit or would not be accountable for. See U.S.S.G. Appendix C, Amendment 634, Reason for Amendment, paragraph 2. The Court's reading of subsections (a)(1) and (a)(2) effectively categorizes the present defendant with third-party money launderers for the purpose of applying section 2S1.1(a), which is appropriate because the money laundering counts here are not based on defendant's conduct in generating the funds.

ORDERED that any objections to the above-ordered addendum to the Presentence Report be filed on or before September 30, 2005.

IT IS SO ORDERED.

August 31, 2005
Syracuse, New York

s/Norman A. Mordue
Norman A. Mordue
U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 2nd day of December, two thousand nine,

PRESENT:

HON. GUIDO CALABRESI,
HON. BARRINGTON D.PARKER,
Circuit Judges[1].

United States of America,
Appellee,

-v.- 05-5965-cr,
06-0949-cr

Rafil Dhafir,
Defendant-Appellant.

Appellee United States of America having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

---

[1] The Honorable Sonia Sotomayor, originally a member of this panel, was elevated to the Supreme Court on August 8, 2009. The two remaining members of the panel, who are in agreement, have determined this matter. *See* 28 U.S.C. § 46(d); Local Rule 0.14(2); *United States v. Desimone*, 140 F.3d 457 (2d Cir. 1998).

IT IS HEREBY ORDERED that the petition is DENIED.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: s/_____
Frank Perez, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 30th day of November, two thousand and nine.

United States of America,
Appellee,

-v.- Nos. 05-5965-cr,
06-0949-cr

Rafil Dhafir,
Defendant-Appellant.

Rafil Dhafir having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is DENIED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

By: /s
Frank Perez, Deputy Clerk